United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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United States Court of Appeals

For the Second Circuit

UNITED STATES *ex rel.* HAROLD KONIGSBERG,

Petitioner-Appellant,

against

LEON J. VINCENT,
Superintendent of Green Haven Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

The petitioner, Harold Konigsberg, appeals from an order of the United States District Court for the Southern District of New York (TYLER, J.), entered January 13, 1975, which denied his petition for a writ of habeas corpus. On January 22, 1975, Judge Tyler granted a certificate of probable cause for appeal to this Court.

On February 9, 1967, Konigsberg was convicted by a jury in the New York Supreme Court, New York County (GELLINOFF, J.), of conspiracy to commit extortion (former

New York Penal Law §580-a) and four counts of extortion (former New York Penal Law §§850, 851). He was sentenced on April 10, 1967, as a multiple felony offender to a term of ten to fourteen years' imprisonment on the conspiracy count and to four terms of twenty to thirty years' imprisonment on the extortion counts. The court directed that the four terms for the extortion counts were to run concurrently with each other but consecutively to the term for the conspiracy count. The court also directed that the state sentences were to commence at the expiration of a ten year federal sentence which Konigsberg was then serving for his conviction for possession of goods stolen from an interstate shipment. The petitioner is now serving his state sentence at the Green Haven Correctional Facility, Stormville, New York.

On March 17, 1970, the New York Supreme Court, Appellate Division, First Department, unanimously affirmed, without opinion, Konigsberg's judgment of conviction. *People* v. *Konigsberg*, 34 A.D.2d 616 (1st Dept. 1970). On July 6, 1970, Konigsberg was granted leave to appeal to the New York Court of Appeals. By orders dated September 21, 1970, and November 19, 1970, the Court of Appeals granted Konigsberg's motion that his appeal be prosecuted upon the original trial and hearing minutes in lieu of a record on appeal upon Konigsberg's compliance with the Court's rules with respect to an appendix. On January 14, 1971, the Court of Appeals issued a further order denying Konigsberg's motion to have the appendix printed at state expense. It also ordered that the appeal be dismissed unless Konigsberg filed a brief and appendix on or before February 1, 1971.

On February 1, 1971, Konigsberg's appeal to the Court of Appeals was dismissed because he failed to file a brief and appendix. He then applied to the United States Supreme Court for certiorari, which was denied on October 12, 1971. *Konigsberg* v. *New York,* 404 U.S. 836 (1971). Subsequently, Konigsberg sought leave to reinstate his appeal in the New York Court of Appeals, but this was denied on January 12, 1972.

On January 26, 1973, Konigsberg applied to the United States District Court for the Southern District of New York for a writ of habeas corpus. His petition contained eight claims including the claim that he was permitted by the trial court to improvidently waive his right to counsel. In March 1973, Judge Harold Tyler referred the petition to United States Magistrate Sol Schreiber for "review and report" pursuant to 28 U.S.C. §636(b)(3). On October 4, 1973, Magistrate Schreiber submitted a report finding Konigsberg's eight contentions without merit and recommending that the petition be denied without a hearing. On October 16, 1973, while the matter was awaiting Judge Tyler's decision, Konigsberg was permitted to amend his petition to add a ninth contention—that he was denied a fair trial by the prosecutor's suppression of a promise made to induce the testimony of a key People's witness. Judge Tyler denied this ninth claim on the merits without an evidentiary hearing on October 16, 1973.

On October 30, 1973, Judge Tyler issued a memorandum decision on the eight claims contained in the original petition. He denied seven of the claims without an evidentiary hearing, but he ordered a hearing to determine whether

Konigsberg was competent to waive his right to counsel at trial and whether he did so knowingly and voluntarily. The hearing was held on April 1 and 2, 1974. Judge Gellinoff, who had presided at Konigsberg's trial, and two psychiatrists who had examined Konigsberg testified. In a decision dated January 13, 1975, Judge Tyler found that Konigsberg did in fact waive his right to counsel, that he was competent to waive his right, that the trial court made a sufficient inquiry into whether Konigsberg was competent to waive his right, and that Konigsberg's waiver was knowing and intelligent.

In his appeal to this Court, Konigsberg renews seven of the claims he made in the court below. He claims that: (1) the record does not support the finding that he validly waived his right to counsel; (2) he was deprived a fair trial by the existence of excessive publicity prejudicial to his case; (3) the prosecutor violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963) in not disclosing a sentence promise made to a key People's witness; (4) he did not make a valid waiver of his right to a jury of twelve; (5) he was denied a fair trial by the court's decision to allow an openly prejudiced juror to sit throughout the trial; (6) the trial court's supplemental charge coerced a guilty verdict; and (7) his right of appeal to the New York Court of Appeals was wrongfully frustrated.

Statement of Facts

The Trial

Konigsberg's trial commenced on December 7, 1966, and continued until February 9, 1967. The following was established by the evidence.

In 1963, a Colorado businessman, Albert Hayutin, entered into a business venture with one Joseph Cannistraci. Pursuant to their agreement, Hayutin turned over to Cannistraci $70,000 which he had borrowed from various acquaintances. Hayutin also gave certain stock certificates to Cannistraci, who in turn gave the certificates to a former business partner, Peter Lobkowicz. After several months, Hayutin's creditors began to insist that the money which they had loaned Hayutin be repaid. Hayutin, who was disillusioned with his venture with Cannistraci, attempted to regain the money and certificates he had given to Cannistraci. Unable to do so, Hayutin enlisted the services of Harold Konigsberg, a man with a reputation as a "good, tough collector."

Konigsberg and two henchmen, Nick Angelo and Anthony Stassi, then embarked on a campaign of terror in order to extract money from Cannistraci and Lobkowicz. Konigsberg met with his victims several times, and he announced that Cannistraci and Lobkowicz each owed Hayutin $60,000. He threatened them with violence and death unless they delivered that money to him. On one occasion, he beat Cannistraci with a rubber hose. On four occasions, Lobkowicz delivered various sums of money to Konigsberg.

At the conclusion of the trial, the jury found Konigsberg guilty of conspiring with Hayutin, Angelo, and Stassi to extort money from Cannistraci and Lobkowicz. He was also found guilty of extorting money from Lobkowicz on four separate occasions. Konigsberg did not challenge the sufficiency of the evidence supporting his conviction in the court below. However, he did make five claims relating to errors which allegedly occurred during the trial. For the purposes of clarity and brevity, the relevant facts and allegations concerning each of those claims will be discussed separately in the Points below.

Proceedings Relating to the Petitioner's Competency

The petitioner's first competency hearing

Konigsberg was arrested on October 23, 1965, and charged in an indictment filed on December 10, 1963, with the crimes of conspiracy to commit extortion, extortion, attempted extortion, and assault in the second degree. His trial was scheduled for November 19, 1964. When it began, Konigsberg claimed that he was incapable of conferring with counsel or preparing a defense (CHT 2) due to paralysis and "aphasia," the inability to speak coherently.* Justice Mitchell Schweitzer then ordered Konigsberg committed to Bellevue Hospital for a psychiatric examination pursuant to former New York Code of Criminal Procedure §658 (CHT 9).

* Numerical references preceded by "CHT" are to minutes of the competency hearings. The minutes of the petitioner's two competency hearings in state court are contained in the same record and the pages are numbered consecutively. The record of the first competency hearing is contained on page 1 through 1177. The record of the second hearing is contained on pages 1188 through 2420.

On January 8, 1965, two psychiatrists reported that Konigsberg was competent to stand trial. Konigsberg moved to controvert their report, and on January 26, 1965, Justice Gellinoff commenced a competency hearing (CHT 4).

One of the psychiatrists who examined Konigsberg at Bellevue, Dr. Lachman, testified that Konigsberg was competent to stand trial (CHT 36-37). He stated that contrary to Konigsberg's claims, Konigsberg was not suffering from paralysis and aphasia (CHT 42-44, 214-16). And he further testified that Konigsberg's behavior was volitionally determined and that he was not in such a state of idiocy, imbecility or insanity as to be incapable of understanding the proceedings or of making a defense [see former Code of Criminal Procedure §658] (CHT 44-46).

Several employees at facilities where Konigsberg had been confined, Bellevue Hospital and the Federal Detention Headquarters in New York City, also testified and contradicted the defense contentions that Konigsberg was suffering from paralysis and aphasia.* They reported that during the period that Konigsberg was undergoing examination and awaiting trial, he was observed playing cards and checkers, talking to visitors, moving his "paralyzed" right hand, yelling at other inmates, complaining about his cell and not being permitted to attend movies, ordering soup, crackers, and candy, reading the *New York Times*, shaving himself, and requesting that a gift be given to another inmate. His speech was also not found to be slurred on

* During his appearances in court, Konigsberg sat in a wheelchair wrapped in a blanket as though he were "dead" (CHT 262).

these occasions (CHT 235-240, 154-264, 237-48, 357, 364, 423-26, 431, 446, 451).

Contrary to the representations of his attorney, Miss Frances Kahn, that she was unable to consult with Konigsberg and that she had never done so (CHT 10, 38, 88, 405, 596), Konigsberg was observed in conversation with her at federal prison (CHT 278-79, 381).

The petitioner called four psychiatrists who had examined him. They offered contradictory testimony and related that Konigsberg was incompetent because of the residuary effect of a brain injury sustained in 1964 (Dr. Rosner: CHT 476-77, 484, 490, 499); that Konigsberg was incompet nt because of a functional brain disorder which was not the result of physical brain damage (Dr. Diamond: CHT 792-95, 797); that Konigsberg was an imbecile and insane wtih respect to judgment and insight (Dr. Frankel: CHT 687, 699, 701, 710-711); and that Konigsberg was suffering from "chronic brain syndrome" which resulted in intellectual disorientation and poor insight (Dr. Semer: CHT 915, 917, 918-920).

The doctors also acknowledged several other facts. Dr. Rosner admitted that Konigsberg's symptoms which supported his conclusion could have been simulated and that Konigsberg probably understood some of what he was charged with (CHT 502, 503, 536, 582). Dr. Frankel said that he could not testify with certainty that Konigsberg was incompetent to stand trial (CHT 762, 751). Dr. Diamond acknowledged that Konigsberg's symptoms fitted into a condition known as Ganser's syndrome. (Ganser's syndrome is a condition characterized by obviously inappro-

priate vague statements. See CHT 1456). He said that the condition is considered by some doctors as evidence of malingering and that in cases of prisoners, it is often designed to avoid court appearances (CHT 810, 812, 815). Dr. Semer ruled out Ganser's syndrome in Konigsberg's case (CHT 918-920).

Konigsberg also testified at the hearing. He gave mumbled and incoherent responses to the questions he was asked (e.g., CHT 979-982A).

Another psychiatrist, Dr. Train, was called by the People. He had observed Konigsberg during the hearing and concluded that he was competent to stand trial because he was oriented and had memory retention (CHT 989). He gave as examples Konigsberg's change in court-room behavior after being warned by the judge, his playing checkers at prison, his understanding of his classification at Federal Prison, and his recollection of being beaten and ordering candy. Dr. Train said:

> In the sense that [Konigsberg] is not suffering from idiocy, imbecility, or insanity, he would be able to understand the nature of his charge, his indictment, and the proceedings against him, and * * * if he willed, he would prepare or make his defense (CHT 1067).

The court concluded, on the basis of evidence adduced at the hearing and its own observations, that Konigsberg was not in such a state of idiocy, imbecility or insanity as to be incapable of understanding the proceedings or of making his defense. [Former Code of Criminal Procedure §658.] (Decision of GELLINOFF, J., April, 1965.) In addition, based on the foregoing evidence and testimony, and

particularly the conflict in testimony among Konigsberg's expert witnesses and the marked disparity between his court-room behavior and his prison and hospital behavior, Judge Gellinoff had reason to believe that the petitioner's claims of incompetency and physical disability were a [illegible] on the court and entirely without foundation (CHT 389, 466).

The petitioner's second competency hearing

After the first hearing, Konigsberg was remanded to federal custody. On September 4, 1965, he was admitted to the Medical Center for Federal Prisoners, Springfield, Missouri. An extensive psychiatric examination was then undertaken. In a report dated April 5, 1966, Konigsberg was reported as being of unsound mind pursuant to 18 U.S.C. §4241. However, Myrell E. Alexander, Director of the Bureau of Prisons, stated in his report of April 7, 1966: "The certification does not necessarily mean that Mr. Konigsberg is not mentally able to stand trial within the meaning of the Federal or New York State laws. It relates only to the fact that his present mental condition requires hospitalization."

In October 1966, Konigsberg, who had then been transferred to the New York City Correctional Facility at Rikers Island, again asked for a hearing on his competency to stand trial (CHT 1192-93). Upon the district attorney's consent (CHT 1371-1372), Konigsberg was committed to Kings County Hospital for observation and for a determination of whether he could understand the charges and make his defense (CHT 1400).

Once again Konigsberg was found competent to stand trial by two state psychiatrists (CHT 1450). Pursuant to his motion to controvert their report, a second competency hearing was ordered. At the hearing, one of the state psychiatrists, Dr. Bromberg testified that on the basis of his examination of Konigsberg and his observation of reports from Bellevue Hospital and the Federal Medical Center, he concluded that Konigsberg was not insane, that he had evinced a Ganser-like syndrome, and that he was a sociopathic personality (CHT 1456-57).

Dr. Alderete, who had examined Konigsberg at the Federal Medical Center also testified for the People. He said that the petitioner's diagnosis was a Ganser syndrome, which involved simulated insanity and betrayed an awareness of reality (CHT 1505). He also said that Konigsberg was able to speak coherently, that he performed work in the kitchen at the Federal Medical Center, and that a test on his "paralyzed" foot indicated that it was not paralyzed (CHT 1507-14). Dr. Alderete also stated that Konigsberg complained about work conditions at Springfield, which indicated contact with reality, and that it was unlikely that petitioner could have "recovered" from aphasia which he previously claimed to have suffered from in eight months (CHT 1516-17). Dr. Alderete concluded that the petitioner was capable of making his defense (CHT 1528, 1543).

Konigsberg called three psychiatrists, Drs. Wilensky, Semer, and Diamond. Each of them testified that Konigsberg was incompetent to stand trial because he was suffering from paranoid schizophrenia (Dr. Wilensky: CHT 1591-94; Dr. Semer: CHT 1805-8; Dr. Diamond: CHT 1879-81). However, the three doctors contradicted themselves on de-

tails of their testimony. Dr. Wilensky said that Konigsberg understood the charges against him but he was incapable of making a defense because of his difficulty communicating with the court and counsel (CHT 1591-94, 1634-35). On the other hand, Drs. Semer and Diamond concluded that Konigsberg could not understand the charges against him (Dr. Semer: CHT 1805-8; Dr. Diamond: CHT 1879).

Dr. Wilensky also acknowledged that Konigsberg was "shrewd" and that he was capable of assessing the circumstances in which he was surrounded and cleverly using them to serve his own ends (CHT 1633). Dr. Diamond stated that he believed with reasonable medical certainty that Konigsberg was mentally ill, although he could not say this with all positiveness (CHT 1888-89).

Several employees of various institutions where Konigsberg had been confined also testified for the People. They disputed Konigsberg's claims that he had been suffering from aphasia and paralysis with evidence that he had communicated with them and others and that he appeared physically fit (CHT 1888-89, 1942-43, 2055, 2071, 2078-81, 2170).

On December 2, 1966, Judge Gellinoff again found Konigsberg competent to stand trial (CHT 2399-2413). He reviewed the evidence in detail and stated that although the petitioner was conceivably mentally ill to some degree and did exhibit symptoms that were indicative of some form of insanity, those symptoms were almost all feigned (CHT 2404). Judge Gellinoff also stated:

> [T]his defendant is a crafty, skillful, resourceful malingerer. In this Court's opinion this defendant is

> capable—I stress the word "capable"—is capable of understanding the charges against him and of the proceedings, and is capable of making a defense. He may not want to, but he is capable (CHT 2408-9).

The trial

Konigsberg's trial commenced on December 7, 1966. On January 3, 1967, after the testimony of two of the People's key witnesses, Albert Hayutin, one of Konigsberg's co-conspirators, and Peter Lobkowicz, a victim of Konigsberg's extortion plot, Konigsberg announced:

> [T]he defendant, Harold Konigsberg, as of now, has representation of—Harold Konigsberg will be represented by counsel, himself and Judge Roy Bean will from hereafter take care of all matters, talk to all witnesses, examine all witnesses. (593-594)

Judge Gellinoff replied:

> Yes, that is perfectly okay. You can represent yourself and have any evidence presented on your behalf that you wish. Miss Kahn [Konigsberg's attorney] is directed by the Court to continue to sit at counsel table and to be of such assistance to you as you wish to avail yourself of. (594)

The court did not immediately make a specific finding on the record that Konigsberg was capable of defending himself. Judge Gellinoff stated on the next day, January 4, 1967, when the prosecutor inquired into whether Konigsberg appreciated the consequences of his waiver of the right to counsel:

> [Konigsberg's] words speak for themselves. I have never yet seen a man who is as clear and as cogent and

as convincing and as persuasive as this defendant and that includes many lawyers (733).

On January 20, 1967, Judge Gellinoff stated specifically that he found the petitioner capable of conducting his defense:

> The Court is satisfied beyond any possible or conceivable doubt that you have embarked on a deliberate and concerted and preconceived and organized plan to pretend that you are insane and to prevent the trial of this indictment. You have, going back several years, malingered and feigned insanity. We have had two hearings and as a result of both of these hearings you have been determined to be fully able to understand the nature of the charge against you and fully capable of making your defense.
>
> Now Mr. Konigsberg, the Court is satisfied beyond any possible doubt that you are able to conduct your defense; that you understand the nature of the charge * * * (2426).

Konigsberg thereafter handled his defense in an intelligent manner. Indeed, the trial court specifically noted, during the trial, that Konigsberg's handling of the case provided additional support of its pre-trial finding that Konigsberg was capable of understanding the proceedings and making his defense (733-34, 1717, 1743-44, 2426-27, 3050-57, 3090-91, 3538, 3745, 4223-24).

The petitioner's federal hearing

In his report to Judge Tyler, Magistrate Schreiber recommended that all of Konigsberg's claims be denied. Concerning Konigsberg's competency to waive counsel, he stated:

> The trial judge, presiding at the [two sanity] hearings, was fully aware that the petitioner had to have the ability to *make* his defense and in this regard found the petitioner competent (Hearing minutes 2155, 2162, 2166, 2400, 2408). Therefore, petitioner had no right to a third hearing on the question of competency. (Magistrate's Report, at 10-11). (emphasis in original).

He also noted that the trial judge had made a specific finding that the petitioner was fully capable of making his defense (2426-27). (Magistrate's Report, at 9).

Judge Tyler approved the report except for its recommendation on the waiver of counsel claim. In ordering an evidentiary hearing on that issue, Judge Tyler noted that although "the New York test under which Konigsberg was found competent to stand trial may well have been broad enough to include the issue of whether or not he was competent to waive counsel," the record did not reveal a specific state ruling on the question of whether Konigsberg's waiver of counsel was intelligent. (Memorandum of October 30, 1973, at 2-3).

The hearing was held on April 1 and 2, 1974. The petitioner called Frank Lopez, an attorney brought into the case by Miss Kahn, who attended the entire trial frequently sitting with Konigsberg. Mr. Lopez testified that he advised the petitioner on the meaning of certain legal terms, helped him with subpoenas, interviewed witnesses, attempted to guide the petitioner in his cross-examinations, and gave legal advice to him (FHM 65, 67, 83, 88, 94).*

* Numerical references preceded by "FHM" are to the minutes of the hearing in the court below.

Lopez also advised petitioner that predicate felonies could be used to enhance his sentence (FHM 71). He and Miss Kahn were also permitted to meet with Konigsberg at Rikers Island during the course of the trial (FHM 92). However, he testified that he acted as Konigsberg's attorney only to the extent that Konigsberg would permit him.

Dr. Bromberg, a psychiatrist who had also testified at the second competency hearing, was called by the respondent and stated:

> "My opinion is that on that date [January 3, 1967], Konigsberg could understand the charge against him, assist in his defense, and waive his right to be represented by counsel and represent himself.
>
> * * *
>
> It is my opinion he could make an intelligent waiver of counsel on that date." FHM at 183.

Judge Gellinoff also testified. He related that he determined in his own mind that Konigsberg was competent to defend himself because: he knew the nature of the charges and the hazards that he faced; he understood the procedures involved; he knew the risks and worst of the consequences; he knew he was facing a long period of incarceration if convicted and sentenced on all counts; and he knew what his rights were. Further, the trial judge also determined that Konigsberg was fully aware that he was depriving himself of the formal representation of counsel, but knew full well that he could avail himself of his attorneys' assistance at any time—an opportunity which he continually took advantage of. (FHM 113-15, 122, 124, 242).

Judge Gellinoff said that he made these determinations based on the testimony at the competency hearings, the demeanor of the petitioner during the competency hearings and the trial, and on information about petitioner's past (FHM 117, 130, 142). He knew that Konigsberg had previously been conviced of other crimes and that he was thus "prison-wise" and knew about counts, sentences and lawyers (FHM 117-118).

In addition, Judge Gellinoff knew that the petitioner had been represented by counsel for more than two years prior to his decision to represent himself. During that time there had been many conferences between Konigsberg and counsel. And Judge Gellinoff therefore concluded that Konigsberg had discussed his case with his lawyers during this period and was aware of the consequences of being convicted of eight felony charges.

Finally, during the trial, Konigsberg engaged in a defense of disparaging the prosecution witnesses. Judge Gellinoff believed that it was a brilliant and effective trial strategy. Indeed, the thought ran through Judge Gellinoff's mind throughout the trial that petitioner was "damn good" in conducting his own defense. (FHM 157, 161-62.) Judge Gellinoff also testified that he observed that Konigsberg made legal arguments and ingenious motions, examined witnesses and devised a strategy, supplemented by such advice as he chose to accept from his lawyer (FHM 154, 161).

POINT I

The petitioner was competent to waive his right to counsel, and the record supports the finding that he did so knowingly and voluntarily [answering the petitioner's brief, Point I].

Introduction

In his habeas corpus petition in the district court the petitioner claimed that he had not competently waived his constitutional right to counsel at trial and that this point had not been considered by the trial court. The respondent argued that the petitioner had fully utilized the assistance of counsel throughout the trial so that he did not, in fact, waive his right to counsel. The respondent further argued that, on the basis of the evidence before him, Justice Gellinoff could and did determine that the petitioner was competent to make an intelligent waiver of counsel.

The petition was referred to Magistrate Sol Schreiber, who found that the trial judge made a determination of competency to waive counsel which determination was amply supported by the record. (Magistrate's Report pp. 6-11.) Magistrate Schreiber recommended that no further evidentiary hearing was necessary.

Judge Tyler accepted the report of Magistrate Schreiber, but determined that the trial record did not conclusively indicate that the trial judge had made an express ruling on the question of intelligent waiver of counsel. (Opinion dated October 30, 1973 at 4a-5a.) He therefore ordered a hearing on this issue "in order to find and explicate mat-

ters as fully as possible." (Opinion dated October 30, 1975 at 6a.)

At the evidentiary hearing the petitioner called Dr. Howard Wilinsky, a psychiatrist who had testified for the defense at trial, Frank Lopez, the attorney assisting Miss Kahn at trial, and Judge Gellinoff as witnesses; the respondent called as its only witness Dr. Walter Bromberg, another psychiatrist who had presented evidence at trial.

On the basis of the hearing, supported by the record of the competency hearings and trial, Judge Tyler found: 1. the petitioner did waive his right to be represented by counsel.* 2. that Judge Gellinoff had made sufficient inquiry and determined that the petitioner was competent to waive his right to counsel knowingly and intelligently, and further that there was sufficient basis on the record to support this determination; and 3. that Konigsberg's waiver was valid, made knowingly and intelligently in spite of the fact that no specific instruction was given or inquiry made by the trial court on this question. (Opinion dated January 13, 1975.)

The petitioner now contends that these findings are not supported by the record.

The party seeking to overturn a factual determination based largely upon testimonial evidence has a heavy burden to meet since the reviewing court will afford deference to the trial court's determination. Fed.R.Civ.P. 52(a). *Hed-*

* The respondent does not concede that there was a waiver of counsel in light of the availability of counsel to petitioner and his frequent utilization of their services. However, since the other findings of Judge Tyler are so clearly correct and so clearly support his denial of the writ we do not now argue that the petitioner was in fact represented by counsel.

ger v. *Reynolds*, 216 F.2d 202 (2d Cir. 1954). The petitioner has proffered no evidence to demonstrate that Judge TYLER's findings were clearly erroneous and has, therefore, not met this burden.

The state court's finding of competence to stand trial included a finding of competence to waive counsel.

Judge GELLINOFF did not make an explicit determination that Konigsberg was competent to waive counsel at the time the petitioner announced that he was discharging Miss Kahn. However, implicit in his acceptance of the waiver was the finding that Konigsberg was competent to make such a waiver (FHT 113-14). He also subsequently announced specifically on the record that he found Konigsberg competent to make the waiver and proceed pro se. He said that he was satisfied that Konigsberg was "fully competent and capable of handling himself (FHM 114). And in light of the competent and imaginative defense presented by Konigsberg, the court was inclined to repeat its finding (733-34, 1717, 1743-44, 3054, 3090-91, 3745). Moreover, he had already found Konigsberg capable of making his defense in his decisions on the two sanity hearings (*see* CHT 2408-09).

In the district court hearing Judge GELLINOFF testified that he made a separate determination of Konigsberg's capacity to make a waiver of counsel. He said he found that "this man is competent to know he is depriving himself of the formal services of the lawyer to which he is entitled and he is deliberately assuming the risk of representing himself" (FHM 122). He also testified that he based his conclusions on his observations of Konigsberg at the hear-

ings and at trial, his knowledge about Konigsberg's background, and the testimony adduced before him (FHM 117, 130, 142). The court below properly credited Judge GELLINOFF's testimony that he in fact determined that Konigsberg was competent to waive counsel.

Before trial, two sanity hearings were conducted and Konigsberg was twice found competent to stand trial. Under the standard then applicable in New York, in finding Konigsberg competent, the trial court determined that he was capable of "understanding the proceedings" and "making his defense" [Code of Criminal Procedure §658]. Moreover, under that standard, the court determined that not only was Konigsberg able to discuss and understand his case, but he also was capable of rationally considering the evidence and making necessary decisions during the course of the trial. *People ex rel. Bernstein* v. *McNeil*, 48 N.Y.S.2d 764 (Sup. Ct. 1944); *accord, People* v. *Swallow*, 60 Misc.2d 171 (Sup. Ct. 1969); *People ex rel. Butler* v. *McNeill*, 30 Misc.2d 722 (Sup. Ct. 1961). The determination that Konigsberg was competent was therefore sufficiently broad to resolve the issue of whether Konigsberg was competent to discharge his counsel and conduct his own defense. No further inquiry by the trial court was necessary.

This conclusion is supported by the recent New York Court of Appeals decision in *People* v *Reason*, —— N.Y.2d —— (Case No. 223, decided July 10, 1975). In that case, a defendant, who had been found competent to stand trial but whose competency was subject to doubt, argued that the finding that he was competent to stand trial did not resolve the question of whether he was competent to waive

counsel. In construing the standard now applicable to determine competency to stand trial [New York CPL §730.10(1); whether a defendant has the capacity "to understand the proceedings against him" and "to assist in his own defense"], the court said:

> "We reject the contention that there are two separate and distinct levels of mental capacity—one to stand trial, another to waive the right to be represented by counsel and to act as one's own attorney. (*Id.* at 2).

Since the finding under the former statutory standard which was applied to Konigsberg was much broader (he was found capable of "making his defense") it is clear that the court's rationale would be even more applicable under the former standard and that the finding of competency to stand trial conclusively established competence to waive counsel.

It should also be noted that Konigsberg's reliance on the case of *Westbrook* v. *Arizona, supra,* is misplaced. In that case, the Supreme Court, citing *Johnson* v. *Zerbst, supra,* remanded to the state court to determine whether a defendant had made a knowing and intelligent waiver of counsel. The Court also noted that, although a hearing had been held to determine whether Westbrook was competent to stand trial, no inquiry had been made into whether he was competent to waive counsel and conduct his own defense. But the Arizona test of competency to stand trial was far narrower than the New York test applied in Konigsberg's case. Arizona Criminal Rule 250 provides that an accused is competent to stand trial if he is capable of understanding the charges and assisting in his own de-

fense. The finding here, however, was much broader and certainly included a finding that Konigsberg was competent to waive counsel and make his own defense.

Judge Tyler properly found that the evidence before Judge Gellinoff provided a sufficient basis for the determination.

There was ample support for Judge Gellinoff's finding. Although the psychiatrists who testified at the competency hearings did not specifically address themselves to the issue of Konigsberg's competence to waive counsel and defend himself, their testimony and conclusions demonstrated that he was. Indeed, Dr. Train said that Konigsberg could "make his defense" if he wanted to (CHT 1067). Doctors Lachman, Bromberg and Alderete concurred (CHT 44-46, 1456-57, 1528, 1543). The doctors and other witnesses who testified at the hearings also gave extensive testimony supporting the conclusions that Konigsberg's incompetence was a fraud and that he was capable of making a knowing and intelligent waiver. It was clear, as the court below found, that Konigsberg was able to "speak properly and comprehend fully" (*e.g.*, CHT: 1895-97); and he comprehended the charge and court proceedings (*e.g.*, CHT: 793, 819, 933, 1130, 1475, 1634). He was also observed capable of conferring with counsel (CHT: 278-79, 381) and did so during the trial before his "waiver."

Furthermore, when Konigsberg began his pro se representation, he unwittingly confirmed the accuracy of the court's finding that he was competent to waive counsel and proceed alone. Not only did he communicate fluently and intelligently, he also revealed that he had been paying close

attention to the testimony previously given and had comprehended its significance.* Similarly, the record overwhelmingly establishes that Konigsberg continued to be alert and aware of the proceedings after he assumed his defense (*e.g.*, 721-25, 773; see, FHM 161).

Thus, on the basis of the competency hearings and the trial, there was sufficient evidence demonstrating that the petitioner was competent to waive counsel and represent himself pro se. Judge Gellinoff did in fact make such a determination on that basis. Further inquiry on his part would have been superfluous.

The petitioner's waiver of counsel was knowing and intelligent.

The records in the state court and the district court conclusively demonstrate that Konigsberg's waiver was valid, made knowingly and intelligently.

At the time of his announcement of Miss Kahn's discharge, the trial court had every reason to believe that Konigsberg's decision was a counseled one. Although Miss Kahn had represented the petitioner for two and a half years, she expressed neither surprise nor uttered a protest to Konigsberg's decision. Judge GELLINOFF, therefore, had a reasonable basis for concluding that Konigsberg knew of

* He made reference to: Hayutin's having committed perjury in the grand jury (600), a fact disclosed four days earlier by Miss Kahn during cross-examination (541-45, 555-62, 580-84); Hayutin's direct testimony that he met Konigsberg in 1960 or 1961 (600); Hayutin's inability (*see* 566-67) to recall whether he or Konigsberg had kept the $1,500 paid by Lobowicz on September 30, 1963 (600); minor details of Hayutin's dealings with the National Growth Company of Denver (600-01); and his contention that on December 27 (*see* 290), the prosecutor had signalled to Hayutin (609-11; *see also* 2348).

his right to counsel and the advantages attendant thereto. *See United States ex rel. Jefferson* v. *Fay,* 364 F.2d 15 (2d Cir. 1966). In addition Judge GELLINOFF took the added precaution of insuring that counsel was available to Konigsberg throughout the remainder of the trial. *See United States* v. *Rosenthal,* 470 F.2d 837, 845 (2d Cir. 1972).

Judge GELLINOFF was also aware of the fact that Konigsberg had prior experiences in court and that he had often been represented by lawyers: "I knew that this man was prison-wise, he knew all about lawyers, he knew all about courts, he knew all about sentences (FHM: 117). *See United States* v. *Rosenthal, supra* at 845; *United States ex rel. Maldonado* v. *Denno,* 348 F.2d 12 (2d Cir. 1972); *United States* v. *Plattner,* 330 F.2d 271 (2d Cir. 1964).

It is true that Judge GELLINOFF did not make a specific inquiry into the intelligent nature of Konigsberg's waiver. But, while as a general rule it is preferable for the trial court to examine the defendant with specificity and advise against self-representation, emphasizing the risk, pitfalls and complexities inherent in such procedure and the serious consequences of conviction, it is not necessary for a trial court to do so, if in the light of all circumstances, the defendant was aware of his right to counsel and its advantages, and knowingly and intelligently waived the right. *United States* v. *Duty,* 447 F.2d 449, 451 (2d Cir. 1971); *United States* v. *Rosenthal,* 470 F.2d 837, 845 (2d Cir. 1972); *United States ex rel. Torry* v. *Rockefeller,* 361 F. Supp. 422 (W.D.N.Y. 1973). Here it was readily apparent that Konigsberg knew what he was doing. And in light of Konigsberg's behavior and the hostile, uncooperative atti-

tude he exhibited towards the court, the court could only conclude that admonishing Konigsberg about the dangers of pro se representation and inquiring into the nature of the waiver would have been frivolous exercises.

The petitioner's waiver of counsel was an intentionally disruptive tactic to create error at trial.

The record indicates not only that Konigsberg's dismissal of counsel was intelligently and competently undertaken, but that it was a cunning artifice designed to abort the trial.

Konigsberg himself demonstrated the fraudulent nature of his waiver. Although he tried to create the impression that he lacked confidence in Miss Kahn, whom he accused of cooperating with the prosecution and being a "spy plotter" (594, 610-11, 726, 1303, 1481, 1729, 1859, 1917, 3078, 3539, 3726), he actually relied on her legal services throughout the trial (1039, 1246-47, 2847-49, 2952, 2956-58, 3052, 3086, 3148-49, 3336-37, 3444, 3519, 3543, 3619-23, 2645-50, 3710-39, 3743-57, 3762, 3771, 3788, 3793, 4013, 4016). He clearly established that her discharge was a fraud when shortly after publicly dismissing her he sought her assistance in interviewing a prospective defense witness (2956). In addition, he permitted the entire examination of rebuttal witness, Doctor Bromberg, to be under her control: she entered objections during the direct examination (3619-23, 3645-47), and, having spent the entire evening of the previous day in preparation (3648-50, 3771), she conducted her own cross-examination (3710-39, 3743-57). Finally, Miss Kahn conferred with Konigsberg on every Saturday of the trial (1246-47, 3519, 4013). And she spent the entire day preceding the summation in conference with him (3788, 3793).

In spite of his declarations that he was handling his defense pro se, Konigsberg also availed himself of the legal services of Frank Lopez, an attorney who attended the entire trial. Konigsberg frequently conferred with him while witnesses were on the stand (1039, 1119, 1285, 1287, 1294, 1326 (twice), 1328, 1415, 1474, 1743, 2017, 2076, 2077, 2104, 2198, 2199, 2209, 2277, 3530, 3531, 3852, 3924). And during Konigsberg's examination of witnesses, Lopez often supplied him with appropriate questions or other useful material (1743, 1917, 2017, 3852). Lopez also furnished the court with Konigsberg's requests to charge (4025), took notes during the charge (4176), and entered the exceptions to it (4176-80). Moreover, after the case was submitted to the jury, Lopez participated with Konigsberg in every conference held with the court and prosecutor (4186, 4202, 4205, 4248-49), and he entered various motions on his client's behalf (4258-59, 4263-65). In addition, Lopez undertook to produce various witnesses (2833-34, 2839, 3342, 3421-22; FHT: 83-84), and he was included in all of the orders permitting Konigsberg to confer with his legal advisers at Rikers Island (1246-47, 4013; FHT: 92).

Thus, Konigsberg sought to have things both ways. Assisted by counsel, he sought to acquit himself. But, purporting to be uncounseled and representing himself, he attempted to do things no lawyer would be permitted to do. He reaped the benefits which counsel afforded, but he was not hampered by the limitations and disadvantages attendant to a conventional defense. He presented his own unsworn version of his crimes without subjecting himself to cross-examination. He sought to prolong the trial and to introduce extraneous and irrelevant matters to confuse the jury. And most importantly, he attempted to abort the

trial with his disruptive behavior. To that end, he engaged in the following tactics.

He repeatedly threatened Judge Gellinoff and was viciously disrespectful to him.* He refused to abide by the court's instructions, continuously made unsworn statements as to his innocence, and repeatedly accused the prosecutor of trying to frame him.** He accused the court of "insulting" and "demeaning" him when the court cut off irrelevant inquiry or excluded extraneous material (611, 1038, 1320, 1729, 1793, 2245, 2247-48, 2688, 3041-42, 3142, 3170, 3228, 4207; and he complained that the court was in league with the prosecutor (610-11, 979, 988-89, 1403, 1465, 1476-77, 1881, 2493, 2842, 2853, 2930, 2944-45, 2981, 3197-98, 3432, 3751), and was endeavoring to deprive him of a fair trial (610-11, 748-49, 1099, 1117, 1477-78, 1647-49, 2103, 2860-61, 2886-87, 3141-42, 3364-65). In addition, he characterized the court's directions and instructions as "bullying," and

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* *See,* 596, 712, 734-35, 747-A, 749, 756-57, 788, 802, 825-26, 1641-44, 1647-50, 1655-57, 1667, 1694-95, 1792-95, 1888-89, 1950, 1036, 1038, 1186-88, 1197-99, 1206, 1210, 1234, 1236-37, 1273, 1288, 1310-12, 1320, 1370, 1465, 1482-83, 1560-61, 1571, 1605, 1642-33, 1647-50, 1655-57, 1667, 1694-95, 1792-95, 1888-89, 1950, 1976, 1988-90, 1999-2000, 2037-38, 2052-54, 2081-82, 2220-21, 2224, 2230, 2236, 2241-43, 2275, 2299, 2306-07, 2354, 2357-58, 2361, 2535-36, 2541-52, 2654, 2691, 2700, 2730-31, 2843, 2852, 2856, 2884, 2886-88, 2900-02, 2905, 2912-15, 2934, 2936, 2943-47, 2994, 3004, 3009, 3017, 3037, 3043, 3050-57, 3080, 3092, 3100, 3118, 3129-30, 3132-34, 3137-39, 3141, 3156-57, 3160, 3168-70, 3183, 3206, 3228, 3349-50, 3363-65, 3377, 3396, 3415, 3417, 3468, 3505, 3509-10, 3513, 3750-51, 3791, 3797, 3813-14, 3842, 3847-48, 3930-31, 4221-35, 4227-28.

** *See,* 603, 606, 702, 713-14, 813, 864, 893-94, 944, 1205, 1234-38, 1310, 1315, 1335, 1361, 1408 1423 1826, 1948-49, 2074, 2097, 2107, 2159, 2265, 2272, 2293, 2493, 2571, 2592, 2672-74, 2738, 2896, 2925, 2941-42, 3006, 3013, 3039, 3105, 3284, 3804, 3809-10, 3843-44, 3887.

"harassing" (607, 609, 613, 735, 864, 1043, 1140-A, 1364, 1637-38, 1694, 2247, 2987, 3034-35, 3041-42, 3791, 4207-08, 4222). He accused the court of being afraid to let the truth come out whenever it would be favorable to the defense, and of always trying to hide the truth unless it would hurt him.* Finally, Konigsberg continually threatened the court that he would prolong the trial unless the court gave into him.**

Konigsberg had successfully avoided trial for almost four years. He engaged in dilatory tactics and caused two competency hearings to be held by his false claims of insanity and physical disability. As the trial itself progressed, Konigsberg could see his chances for acquittal diminish. One of Konigsberg's victims, Peter Lobkowicz, undaunted by the murder of another victim, Joseph Cannistraci, on the eve of trial, gave testimony devastating to Konigsberg's case. Moreover, Albert Hayutin, a coconspirator, unexpectedly cooperated wtih the People's case. He was permitted to plead guilty to a misdemeanor in return for his testimony and he all but sealed Konigsberg's fate by the evidence which he gave.

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* *See*, 852-53, 872, 931, 979, 982, 1099, 1216-17, 1234, 1237-38, 1242, 1273-74, 1277, 1311, 1320, 1330, 1374, 1381, 1457, 1487, 1558-59, 1562, 1595, 1618-19, 1637, 1650, 1655-57, 1668, 1671, 1795, 1870, 1877, 1893, 1898, 1915-16, 1943, 1959, 1976, 1987, 1992, 1999-2001, 2052-53, 2066, 2070, 2232, 2236, 2290, 2321-22, 2333, 2361, 2374-75, 2381-82, 2446, 2449-50, 2570, 2727-28, 2860-61, 2887, 2901, 2904, 2911, 2920, 3160, 3164-65, 3201, 3396.

** *See*, 747-47a, 835, 863, 868-69, 912, 960-61, 971, 1037-38, 1140A, 1184, 1198-99, 1238, 1291, 1300, 1303, 1322-23, 1364, 1372, 1388, 1404, 1559, 1618,19, 1637-39, 1667-68, 1690, 1761, 1792, 1799, 1841, 1943, 1987, 2079, 2104, 2250, 2920, 2954, 3357, 3378.

With these facts in view, Konigsberg embarked on the new defense strategy of deliberately attempting to create the false impression that he was deluded. He no doubt hoped to create error at the trial. To this end, he repeatedly maintained that he was represented by "Judge Roy Bean." But this was a deliberate sham, a fact well known to the court. The existence of this alleged delusion —that Konigsberg was in constant communication with Judge Roy Bean—had been exhaustively explored at the second competency hearing (Bromberg: H 1456-57, H 2124-27, H 2156-57, H 2163; Aldrete: H 1503-08, H 1509-11, H1516-17, H 1523-25, H 1528, H 2035; Filensky: 1591-98, H 1619-21, H 1659, H 1726-31; Semer: H 1805-08, H 1825-26, H 1830-42 H 1852, H 1856-60; Diamond H 1879-8-, H 1895, H 1920-21, H 1928-30 R 1936; Herrara: H 1955-56, H 1973, H 1980-81). On the basis of the evidence there adduced the trial court had explicitly rejected the notion that Konigsberg was suffering from any delusion (48).

Thus, Konigsberg's waiver of counsel was made knowingly. Indeed, the record indicates that the petitioner's waiver was a deliberate strategic ploy. Konigsberg never, in fact, relinquished the benefits associated with the right to counsel [*Faretta* v. *California, supra* at 5013], while at the same time he engaged in disruptive self-serving conduct which would not have been tolerated from an attorney. Konigsberg deliberately requested that his counsel be dismissed; counsel was nevertheless made available to him which benefit he utilized fully; and he benefitted from the situation by being granted greater flexibility in his defense. His present disingenuous claims of constitutional infirmity must be rejected.

POINT II

Publicity about the petitioner's case did not prevent a fair trial since no jurors were exposed to it [answering the petitioner's brief, Point II].

The petitioner claims that he was denied a fair trial because of the existence of excessive prejudicial publicity surrounding his trial and because the trial court failed to take adequate measures to insulate the jury from the publicity's prejudicial effects.

Publicity about the petitioner's case did not deprive him of a fair trial.

Where publicity prior to and during a trial is neither inherently prejudicial nor unusually extensive, an accused must show actual prejudicial influence on the jury in order to obtain a reversal of a jury conviction. *Gordon* v. *United States,* 438 F.2d 858, 874 (5th Cir.), *cert. denied* 404 U.S. 828 (1971); *Hale* v. *United States,* 435 F.2d 737, 746 (5th Cir. 1970), *cert. denied* 402 U.S. 976 (1971). However, there are certain extreme circumstances where convictions have been overturned without a showing of prejudice because of "inherently prejudicial publicity which saturated the community." *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966); *see Estes* v. *Texas,* 381 U.S. 532 (1965); *Rideau* v. *Louisiana,* 373 U.S. 723 (1963). In this case, it is beyond question that the jury was not prejudiced by media accounts of the case. And the community was clearly not "saturated" with extensive publicity prejudicial to the petitioner. The record indicates that Konigsberg "receive[d] a trial by

an impartial jury free from outside influences." *Sheppard* v. *Maxwell, supra* at 362.

Articles about the petitioner's trial appeared in newspapers on about 20 occasions after the trial had commenced. However, there is no evidence that any juror was exposed to any reports of the trial. Each day the court instructed the jurors to avoid media accounts of the case. And when the court asked the jurors at the commencement of its charge whether any of them had "read anything about [this case] in the newspapers since the case started?" (4030), the jurors indicated by not raising their hands that none of them had. Thereafter, the jurors were sequestered until they concluded their deliberations.

The jurors also demonstrated by their deliberations and their verdict that they had not been prejudiced by publicity concerning the trial. Rather than rush to convict the petitioner, the jurors debated his fate for two days. They convicted him of five counts, acquitted him of one count, and were unable to arrive at a verdict on four other counts (4261). Significantly, two of the counts which the jury could not agree upon involved alleged assaults upon Joseph Cannistraci (one of the extortion victims), although the very newspaper article cited by the petitioner as being unduly prejudicial in his brief before this Court (at 21-22) refers to Konigsberg as struggling to free himself from a ten count indictment "arising out of a brutal beating administered to Joseph Cannistraci, 32, on October 2, 1963."

Thus, the record is totally absent of evidence that any juror was influenced by publicity concerning the trial. To

conclude otherwise would require, as in the case of *Gordon* v. *United States, supra* at 873, the application of several unfounded presumptions: that the jurors ignored the court's instructions that they avoid any media accounts of the case, that the jurors lied when they indicated that they had not read anything about the case, and that they were prejudicially influenced by the news stories involved. Yet the law will not permit such presumptions. *Id.* "Appellate courts are slow to impute to jurors a disregard of their duties." *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933); *see also United States* v. *Kellerman*, 431 F.2d 319, 324 (2d Cir. 1970), *cert. denied* 400 U.S. 957 (1971) ("[T]he entire jury system is dependent upon the assumption—whether it be fiction or not—that the jury will follow the court's instructions").

The petitioner is therefore forced to argue, based on the Supreme Court's decision in *Sheppard* v. *Maxwell, supra,* that he was deprived of a fair trial by the mere existence of excessive prejudicial publicity and the trial court's alleged failure to minimize its impact.

The record, however, reveals nothing in the way of publicity similar to that which was condemned in the *Sheppard* case. Indeed, that case involved one of the most publicized criminal trials in American legal history [*see Margolis* v. *United States,* 407 F.2d 727, 732 (7th Cir. 1969)], and it is totally distinguishable from the case at bar. Sheppard's trial was accompanied by massive coverage in the press and on radio and television, prior to and during the trial itself. Indeed, the Supreme Court noted that there were five volumes of newspaper clippings, in-

cluding several front page editorials, radio debates, and interviews with prospective witnesses. Every juror, except one, admitted on *voir dire* that he had been exposed to media accounts about the case. The names of the prospective jurors were also published in the local newspapers, and as a result they received many letters and phone calls about the case. Moreover, during the trial, pictures of the jury appeared forty times in the local newspapers (*see* 384 U.S. at 345).

No such publicity was attendant to trial in the case at bar. Indeed none of the jurors were exposed to any publicity concerning the case. And as Magistrate Schreiber found in his report which was accepted by the court below, no more than 20 articles about the case appeared in the New York City daily newspapers over the course of the nearly nine week trial. Thus, there was absent from this case the inherently prejudicial "saturation publicity" which formed the basis for the holding in the *Sheppard* case. In addition, in *Sheppard,* a massive amount of prejudicial publicity preceded the trial. Here, the newspaper articles cited by the petitioner date largely from the commencement of the trial and deal primarily with the petitioner's antics in the courtroom, all of which had already been viewed by the jurors themselves.

The trial court's response to the existence of the newspaper articles was also proper and clearly not an abuse of the "broad discretion" it has in this area. *United States* v. *Marshall,* 360 U.S. 310, 312 (1959); *United States* v. *Manfredi,* 488 F.2d 588, 604 (2d Cir. 1973); *United States* v. *Persico,* 425 F.2d 1375, 1382 (2d Cir. 1970).

From the very beginning of the trial, the court admonished the jurors not to read anything about the case in the newspapers, and not to listen to anything about it over the radio or on television (57, 84, 91, 98-9, 116-17A, 154-5, 157, 1031-2, 1138-9, 1164, 1244, 1427, 1615, 1938, 2001, 2004, 2200-1, 2420, 2596-7, 2747, 2952, 3118-20, 3245, 3323-4, 3424-6, 3542-3, 3573-4, 3780, 3931, 4007-8). These admonitions were frequently accompanied by persuasive, common-sense explanations as to the necessity of ignoring anything written or said about the case outside the courtroom.

The court also polled the jury at the commencement of its charge, and it ascertained that each juror had indeed abided by the court's instructions (4030). No one had read anything about the case.

During their deliberations, the jurors were sequestered and denied access to radio, newspapers, television, and the telephone (4242-3). When a court officer observed one of the jurors holding a transistor radio, the court immediately questioned that juror in the presence of the defendant, his attorneys, and the prosecutor (4249). The mere fact that the radio was played did not taint the deliberations of the jury. *See McKinney* v. *Boles,* 254 F. Supp. 433, 437 (N.D.W.Va. 1966). And surely there was no prejudice to the petitioner. The juror stated that he had played the radio on only two occasions and that "at no time" had he heard anything about the case over the radio (4249-4251).

Therefore, the court established to its own satisfaction that no juror had been exposed to any publicity about the case. Under these unexceptional circumstances, it was

totally unnecessary for the court, as the petitioner suggests, to sequester the jury during the trial [*United States ex rel. Mayberry* v. *Yaeger,* 321 F. Supp. 199, 205-06 (D.N.J. 1971)] or to call upon the press to exercise restraint, especially since there was no showing that the press was doing anything other than furnishing responsible coverage of the trial. *Couser* v. *Cox,* 324 F. Supp. 1140, 1141-2 (W.D. Va. 1971); *see Sheppard* v. *Maxwell, supra* at 349-352. Moreover, it was not error for the court to decline to poll the jury each time a newspaper article concerning the petitioner appeared. *Gordon* v. *United States, supra* at 872.

The claim was never raised in the state courts and, therefore, it should have been dismissed by the court below.

It should be noted that in his direct appeal in the state courts, the petitioner argued only that he was deprived of a fair trial because the trial court failed to conduct a hearing when it was learned that two jurors had listened to a radio during the jury's deliberations. The precise legal claim now made was never raised in the state courts. The trial record indicates, however, that the right now asserted was not unknown to the petitioner (108-9, 870, 1144-46, 3144). *See United States ex rel. Agron* v. *Herold,* 426 F.2d 125, 127 (2d Cir. 1970). And since the *Sheppard* decision relied on by the petitioner had preceded his trial, the right was "in existence" and available to be asserted. *Compare United States ex rel. Gallo* v. *Follette,* 270 F. Supp. 507, 515-16 (S.D.N.Y. 1967). Thus, the petitioner, represented and assisted by counsel at trial and in the course of his state appeals, "understandably and knowingly forewent the privilege of seeking to vindicate his federal claim in the state

courts * * *." *Fay* v. *Noia,* 372 U.S. 391, 439 (1962). Because of this "deliberate bypass" of the state procedures previously available, his prejudicial publicity claim should have been dismissed by the court below. *United States ex rel. Agron* v. *Herold, supra* 217 .

Moreover, even if the petitioner had not relinquished his state remedies, his claim should be dismissed. While the claim which he raised upon his state appeal is related to that now asserted, it is not its "substantial equivalent" and the state courts have not had a fair opportunity to pass on the precise legal issue before this Court. *Picard* v. *O'Conner,* 404 U.S. 270, 275-278 (1971); *see United States ex rel. Gibbs* v. *Zelker,* 396 F.2d 991, 993 (2d Cir. 1974); *United States ex rel. Rogers* v. *LaVallee,* 463 F. 2d 185, 187 (2d Cir. 1972). Therefore, the claim should be dismissed for the petitioner's failure to exhaust available state remedies. 28 U.S.C. §2254(b)(c).

POINT III

All representations made by the prosecution to the witness Hayutin were fully disclosed at trial [answering the petitioner's brief, Point III].

The petitioner claims that his due process rights were violated by the prosecutor's withholding of the fact that one of Konigsberg's co-defendants, Albert Hayutin, was promised a suspended sentence in return for his testimony against Konigsberg. This claim is conclusively refuted by the record.

During Konigsberg's trial, one of his co-defendants, Albert Hayutin, was permitted to plead guilty to a misde-

meanor to cover all counts in the indictment against him. He subsequently testified for the People against Konigsberg. On cross-examination, he related that he was told by his lawyer that he would have to testify against Konigsberg if he wanted to plead guilty to a misdemeanor. He was also asked if any promises concerning his sentence had been made to him in return for his testimony (568-9). He replied, "No" (569). This response was confirmed and clarified by the assistant district attorney who prosecuted the case. When the prosecutor, Mr. Rogers, was called as a defense witness, he was asked, "Have you made any deals with any witness in this case for their testimony?" He responded:

> "No. The only one was Hayutin. I told Hayutin that his cooperation with the District Attorney's Office would be brought to the attention of Justice Gellinoff at the time of sentence, which I believe to be February the 8th". (2855-6).

After the trial, however, at Hayutin's sentencing,* Hayutin's lawyer argued that a suspended sentence should be imposed on his client because the prosecutor had "assured" him that such a sentence would be the result of Hayutin's cooperation. Assistant District Attorney Rogers immediately corrected this misrepresentation:

> * * * I discussed this case directly with Mr. Miller [Hayutin's lawyer] and his associate, Mr. Lubell, but most particularly with Mr. Miller. *At no time did I state that he would not do any time in jail* nor would I recommend it.
>
> * * *

* A copy of Hayutin's sentencing minutes was submitted to the court below.

I conveyed my thoughts immediately to Mr. Miller, in the presence of Mr. Hayutin. And to paraphrase, put it in vernacular, *I said he would have to take his chances,* that I would not, as your Honor knows, I have not asked the Court here this morning to do anything with this man, that I would remain neutral, and I made no other commitments other than what I just stated to the Court.

* * *

Mr. Justice Gellinoff, I don't care what Mr. Miller says. When it comes down to a contest between whether or not I accurately represented the State on this question, let me state something for the record. I was very explicit. And so that Mr. Hayutin would understand exactly what was going on, *I said, you're going to have to take your chances. I will not, I will not recommend to the Court a suspended sentence. You're just going to have to take your chances.*

I don't care whether Mr. Miller or anyone else hoped that this Court would suspend the sentence. But I do not want this Court to be swayed one way or the other by what I consider a completely erroneous statement by Mr. Miller. (Hayutin's Sentencing Minutes, at 16-18) (emphasis added).

These facts were confirmed by Hayutin's lawyer who then acknowledged that the prosecutor had not made a commitment concerning sentence to Hayutin and that it had been merely the lawyer's "feeling" that his client would be given a suspended sentence (Hayutin's Sentencing Minutes, pp. 17-18).

Thus, based on the uncontradicted testimony of Mr. Rogers and Hayutin at trial and the statements made by

Rogers and Hayutin's lawyer at Hayutin's sentencing, it is clear that a promise of a suspended sentence was never made by the prosecutor to Hayutin. Moreover, there was full candid disclosure by Assistant District Attoney Rogers as to the representations actually made—that Hayutin's cooperation would be brought to the attention of the sentencing judge. And Hayutin himself readily acknowledged that his testimony against Konigsberg was given in return for his being permitted to plead guilty to a misdemeanor.

Therefore, contrary to the petitioner's claim, there was no suppression of evidence concerning a plea bargain [*compare Giglio* v. *United States,* 405 U.S. 150 (1972)] and clearly no violation of the petitioner's due process rights [*compare Brady* v. *Maryland,* 373 U.S. 83 (1963)]. Moreover, since no factual issue fairly exists on the face of the record, the District Court was clearly correct in denying an evidentiary hearing on this point.

Konigsberg contends, without explanation, that at the time of his state appeal, he was not aware of the statements made at Hayutin's sentencing. Although he argued in state court that his rights were violated by the prosecutor's failure to disclose the inducement for Hayutin's testimony, he never presented his claims that Hayutin had been promised a suspended sentence and that the testimony at trial was inconsistent with the statements made at Hayutin's sentencing. It should be noted that Hayutin was sentenced on April 14, 1967, and Konigsberg's state appeal was pending until February 1, 1971, certainly adequate time to have discovered these facts and presented them to

the state court. If, as the petitioner contends, "new" evidence is contained in the sentencing minutes, this evidence must be first reviewed by the state court.

It is well settled that where a petitioner has

> * * * failed to present all pertinent information bearing on a claim [in state court], and subsequently he presents a materially different and stronger evidential case to the federal court, the requirement of exhaustion is not met where a state forum is still available to consider and pass on the additional facts first presented to the Federal Court. *United States ex rel. Kessler* v. *Fay,* 232 F.Supp. 139 (S.D.N.Y. 1964).

Accord, United States ex rel. Cleveland v. *Casseles,* 479 F.2d 15 (2d Cir. 1973); *see also,* Developments in the Law-Federal Habeas Corpus, 83 Harv. L.R. 1038, 1095-6 (1970).

State procedures remain available to review the petitioner's claim in light of the new evidentiary facts alleged. *See* New York Criminal Procedure Law §440.10 (1)(h). Therefore, Konigsberg has failed to exhaust his available state remedies and his claim should not have been considered by the court below. 28 U.S.C. §2254(b)(c).

POINT IV

The trial court was totally impartial towards the petitioner and did not deprive him of a fair trial [answering the petitioner's brief, Point V(b)].

The petitioner claims that he was denied a fair trial because of the trial court's prejudice against him. To support his claim he alleges that the District Attorney selected the trial judge, that the trial court exhibited bias towards him and did nothing to insure that his rights were safeguarded, and that the trial court's supplementary instructions to the jury coerced a guilty verdict.

The claim that the trial judge was chosen by the prosecutor was never raised in the state courts and is totally without support on the record. Equally spurious is the assertion that the court failed to safeguard the petitioner's rights. Konigsberg overlooks the fact that he had the able assistance of two experienced attorneys at trial, Frances Kahn and Frank Lopez, who insured that Konigberg's rights were safeguarded and that a proper defense was presented. These attorneys remained available to him by reason of specific direction of the Court. When Konigsberg announced his intention to represent himself, the court ordered Miss Kahn to continue to advise Konigsberg during the trial (594).

The petitioner has failed to point out any occasion where the court evinced bias towards him or where it was derelict in safeguarding his rights. Konigsberg repeatedly insisted that he would disregard the court's instructions and would handle things his own way (247A-8, 864, 1037-8, 1043, 1140-

40A, 1202, 1224, 1237-8, 1368, 1548-9, 1559, 1642, 1694, 1761, 1892, 1946, 1987, 2104, 2688, 2651, 2861, 2919, 2929, 2944-5, 4222-3). And his conduct was flagrantly disrespectful, contumacious, and threatening towards Judge Gellinoff at every stage of the trial* (it was designed to provoke a mistrial). Nevertheless, the court scrupulously endeavored to ensure that the petitioner's rights were safeguarded and that he received adequate legal counsel.

Also without merit is the petitioner's claim that the judge displayed prejudice and coerced a guilty verdict by the supplemental charge given in response to the jury's request. Most significantly, neither Konigsberg nor his attorney voiced any objection to the charge. The claim now made was not preserved for state review. *See* former Code of Criminal Procedure §§420-a; 455. And federal review is similarly limited.

After the jury had deliberated for 24 hours, it reported that it was "hopelessly deadlocked on practically all counts" (4191) and it requested further instructions concerning the crimes of extortion and conspiracy (4191-2). The court then explained the differences between conspiracy to extort, attempted extortion and extortion itself (4193).

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*See, 596, 712, 734-5, 747-A, 749, 756-7 788, 802, 825-6, 835-6, 845, 871-2, 876-7, 890, 900, 934, 946, 949-50, 966, 988-9, 1036, 1038, 1186-8, 1197-9, 1206, 1210, 1234, 1236-7, 1273, 1288, 1310-12, 1320, 1370, 1465, 1482-3, 1560-1, 1571, 1605, 1642-4, 1647-50, 1655-7, 1667, 1694-5, 1792-5, 1888-9, 1898-9, 1950, 1976, 1988-90, 1999-2000, 2037-8, 2052-4, 2081-2, 2220-1, 2224, 2230, 2236, 2241-3 2275, 2299, 2306-7, 2354, 2357-8, 2361, 2535-6, 2541-2, 2654, 2691, 2700, 2730-1, 2843, 2852, 2865, 2884, 2886-8, 2900-2, 2905, 2912-15, 2934, 2936, 2943-7, 2994, 3004, 3009, 3017, 3037, 3043, 3050-7, 3080, 3092, 3100, 3118, 3129-30, 3132-4, 3137-9, 3141, 3156-7, 3160, 3168-70, 3183, 3206, 3228, 3349-50, 3363-5, 3377, 3396, 3415, 3417, 3468, 3505, 3509-10, 3513, 3750-1, 3791, 3797, 3813-14, 3842, 3847-8, 3930-1, 4221-5, 4227-8.

Rather than repeat the instructions given in the main charge or use an abstract set of facts that would have borne no relationship to the crimes charged and would have increased the jury's confusion, the court properly gave examples that would be comprehensible in relation to the evidence which the jurors were considering. *See People* v. *Miller,* 6 N.Y.2d 152 (1959); *People* v. *Gezzo,* 307 N.Y. 385 (1954); *Peopde* v. *Gonzalez,* 293 N.Y. 259 (1944). Indeed, at the conclusion of the charge, each juror indicated that the charge answered the questions that had been troubling them (9200-01). *See United States ex rel. Bonomolo* v. *Wallack, supra* at 18.

In addition, throughout its supplemental charge the court made it clear that it was employing a factual situation only as an illustrative device, and that it was not finding that those particular acts were committed. Thus, in the course of its remarks, the court admonished:

> I'm giving you a hypothetical illustration, and it is for you and not for me to say what happened. And remember that, and don't think I'm trying to tell you what you should do. I'm trying to explain. (4195)

At the close of its supplemental charge, the court again emphasized that it was the jury's function to ascertain the facts:

> Now, members of the jury, I want to caution you—and it's very important that you all understand—that the responsibility for the verdict is not mine, it's yours. I do not mean to infer in any way by the example that I have given you that I have any opinion on the facts. By that I mean I don't want my opinion, even assuming

> that I have any, to influence you so that you will think you are under any obligation to make my opinion your opinion. (4198)

These forceful cautionary instructions eliminated any danger that the jurors would be confused or that they would misunderstand the court's position. Moreover, the jurors demonstrated by their verdict and their deliberations that they were not prejudiced by the supplemental instructions. They acquitted Konigsberg of one count of extortion, remained deadlocked for two days on the four extortion counts for which he was convicted, and were thereafter never able to agree on the remaining counts of the indictment.

In this Circuit, errors in a jury charge given in a state trial that are of sufficient magnitude to be fundamentally unfair and violative of due process, are generally reviewable on habeas corpus. *United States ex rel. Petersen* v. *LaVallee,* 279 F.2d 396, 400-01 (2d Cir. 1060), *cert. denied* 364 U.S. 922 (1960); *Lee* v. *Henderson,* 342 F. Supp. 561, 563 (W.D.N.Y. 1972); *United States ex rel. Santiago* v. *Follette,* 298 F. Supp. 973 (S.D.N.Y. 1969).* However, where the alleged errors were not objected to when the charge was delivered, the standard of review is far more stringent. As Judge Edelstein noted in *United States ex*

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* Generally, claims involving errors in a state court's jury charge are a matter of state law and procedure. *Kearney* v. *Peyton,* 360 F.2d 589 (4th Cir. 1966); *United States ex rel. Berberian* v. *Cliff,* 300 F. Supp. 816 (E.D. Pa. 1969). And, some courts suggest that errors in instructions are not reviewable on federal habeas corpus. *Martinez* v. *Patterson,* 371 F.2d 815, 816 (10th Cir. 1066); *Maxwell* v. *Hudspeth,* 175 F.2d (10th Cir. 1949); *United States ex rel. Bordog* v. *Claudy,* 108 F. Supp. 778 (M.D. Pa. 1952).

rel. Bonomolo v. *Wallack,* 238 F. Supp. 14, 18 (S.D.N.Y. 1965):

> No objections * * * were made to the supplementary instructions [in a state trial] * * *. In the federal courts, therefore, no assignment of error to the supplementary instructions could have been presented on appeal, Fed. R. Crim. P. 30, where the alleged errors were neither "plain" nor "substantial," Fed. R. Crim. P. 52(b); *United States* v. *Haynes,* 291 F.2d 166, 167 (2d Cir. 1961), and "did not seriously * * * [affect] the substantial rights of defendant." *United States* v. *O'Conner,* 237 F.2d 466, 472 (2d Cir. 1956). There is no reason to grant broader scope to a review on collateral attack by habeas corpus.

In this case, it is clear that under either standard the challenged instructions were free from error and not prejudicial to the petitioner.

POINT V

The petitioner was not denied a fair trial by the court's decision to permit a juror who had indicated that he was "prejudiced" to sit until the case was submitted to the jury [answering the petitioner's brief, Point V(a)].

Konigsberg claims that he was denied a fair trial because the trial court permitted an openly prejudiced juror to sit throughout the trial. He asserts, notwithstanding the juror's exclusion before the jury retired to deliberate and the court's repeated admonitions to the jurors not to discuss the case, that the juror could have influenced his fellow jurors and deprived the petitioner of a fair trial. The claim is entirely speculative and clearly without merit.

Shortly after the commencement of the People's case, several jurors requested to be excused due to the anticipated length of the trial (717). The court informed the jurors that under the circumstances of the case, it had decided to deny all requests to be excused (718-19). Juror number 10 then announced that due to changed circumstances he was a "prejudiced juror" (719-21). The court, rather than make a hasty decision, ordered the juror to return the following day. When the petitioner objected, the court assured him that it had not ignored the juror's statement and it would resolve the problem the following day (722). The court also stated to the jury:

> In the meanwhile, don't discuss the case amongst yourselves; don't discuss it with anyone else. Don't form or express any opinion until the case is finally submitted to you. (722-23).

The following day the court announced that no juror would be excused. It acknowledged that hardships might result to individual jurors because of the length of the trial, but it noted that the interests of the orderly administration of justice required that all the jurors sit throughout the trial (728-29). The court also reminded the jurors that they had already sworn that they would render a decision based only on the evidence (731).

One month later, however, as the court was ready to begin its charge, the petitioner, through one of his attorneys, Frances Kahn, requested that juror number 10 be removed (4016). Since it was then apparent that two alternates would be a sufficient number to insure against possible illness or disability of a regular juror, the court

granted the petitioner's request (4010). The court also questioned juror number 10. And he related that he had "tried to keep an open mind" throughout the trial, that he was not prejudiced in any way, and that "at no time * * * [had he] discussed this case with any of [his] fellow jurors" (4015-4019).

The petitioner was clearly not deprived of a fair trial by the court's decision to retain the tenth juror until it was certain that a sufficient number of jurors and alternates were available to reach a verdict. The juror himself stated that he was not prejudiced and that he was ready to deliberate with an open mind. Moreover, the fact that the juror disclosed his "prejudice" only when the court denied all requests for excusals indicates that the juror's announcement was not the result of his bias towards the petitioner but rather his desire to be discharged because of the trial's unforeseen length.

In any event, even if he was prejudiced, he did not influence the jurors who did not in fact render the verdict. He was withdrawn at the petitioner's request before the jury retired and did not participate in the deliberations. *See Linden* v. *Dickson,* 287 F.2d 55, 61 (9th Cir. 1961); *McKinney* v. *Boles,* 254 F.2d 433, 439 (N.D.W. Va. 1966). In addition, the juror assured the court that he had complied with the court's admonitions and had never discussed the case with anyone, including his fellow jurors.

Moreover, it should be noted that the court's admonitions not to discuss the case were directed at the other jurors as well. In the absence of any evidence to the con-

trary, the presumption that jurors have complied with the court's instructions should be given full effect. *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485, 53 S. Ct. 252, 77 L. Ed. 439 (1933); *United States* v. *Kellerman*, 431 F.2d 319, 324 (2d Cir. 1970), *cert. denied* 400 U.S. 957 (1971).

POINT VI

The petitioner made a knowing and intelligent waiver of his right to a jury of twelve [answering the petitioner's brief, Point IV].

The petitioner claims that when he consented to the replacement of a juror who became ill during the jury's deliberations, he did not make a knowing and intelligent waiver of his right to a jury of twelve.

Introduction

After the jury had deliberated for 24 hours, one of the jurors notified the court that his health would not permit him to continue (4201). The court determined that there was no possibility that the juror could return to deliberate (4201), and it asked whether the petitioner had any objection to the juror being excused. The petitioner responded: "His health is more important at this point, Your Honor" (4202). The prosecutor also told the court that he did not object to the juror being excused. A conference was then held out of the hearing of the jury. The prosecutor drew the attention of the court, the petitioner, and his attorney, Frank Lopez, to the then recently decided case of *People* v. *Ryan*, 19 N.Y.2d 100 (1966). Following this discussion, the

juror was excused (4202-3). The petitioner's personal consent was formally asked for and received:

> The Clerk: Harold Konigsberg, do you personally consent that Juror Alexander Kaufman be discharged from further attendance at your trial?
> The Defendant: Yes. (4203).

The court then directed that an alternate juror be called (4203). However, the prosecutor interrupted and informed the court that the *Ryan* case required that before the juror could be excused, the petitioner was required to consent in a written instrument (4203-4).

At the court's request, Mr. Rogers then wrote out a formal consent, and Konigsberg, after both he and Mr. Lopez had read it, signed the document. An alternate, who had remained separated from the other jurors in the custody of a court officer, at the court's direction, was then selected.

Konigsberg then addressed the court: "Your Honor, I was just thinking for a second—" (4205). The court interrupted Konigsberg and asked him not to make any statements in the jury's presence (4205). The jurors then retired to resume their deliberations at 3:52 p.m. (4206), and Konigsberg continued his thought:

> Konigsberg: One motion, Your Honor.
> The Court: All right; make it.
> Konigsberg: The defendant—and it's not a speech
>
> * * *
>
> The Jury—the foreman of the jury communicated with this Court and said that they were hopelessly deadlocked. Another juror said he was sick, and his health is as important as my freedom. I—

The Court: You said you weren't going to make a speech. What is your motion?

Konigsberg: I'm not making a speech, and this is my motion.

This jury said they were hopelessly deadlocked. This Court refused to accept that. Another juror was sick. But what the defendant is saying is simple. If they're hopelessly deadlocked, then if we should dismiss this jury, the withdrawal of a juror and call a mistrial—

The Court: All right; so you move for the withdrawal of a juror.

Konigsberg: *Only because they're hopelessly deadlocked.*

The Court: All right. Motion denied. You have an exception.

Konigsberg: *That's all* (4206-8) (emphasis added).

At 6:30 p.m., the jury returned with a verdict of guilty on two counts of the indictment (4208-10). They then resumed their deliberations on the other counts. At approximately 11:00 p.m., more than seven hours after the ill juror had been discharged, the defendant first rose to challenge his consent. He attacked the constitutionality of Section 358-a of the Code of Criminal Procedure, which authorized the replacement of a juror unable to continue deliberations, and he claimed that his consent to the seating of the alternate juror was "not voluntary nor intelligently made." (4220). The court properly rejected these claims.

The procedures followed in replacing the ill juror were not violative of the petitioner's rights.

There is no question that the procedures followed in replacing the ailing juror were in compliance with State law and not violative of any of the petitioner's federal

rights. The New York Court of Appeals provided in *People* v. *Ryan,* 19 N.Y.2d 100 (1966), that an ailing juror could be replaced after deliberations had commenced pursuant to the then applicable State law, Code of Criminal Procedure §358-a. However, since the replacement of a juror alters the composition of the "common law jury" of twelve to which a defendant is entitled [*People* v. *Mitchell,* 266 N.Y. 15 (1934); *People* v. *Cosmos,* 205 N.Y. 91, 98 (1912); New York Const. Art. 1, §1, Art. 6 §18], the defendant's consent to the replacement (or waiver of his right to be tried by a "common law jury") must be executed in accordance with Article 1, §2 of the New York Constitution "by a written instrument signed by the defendant in open court before and with the approval of [the trial] judge." *People* v. *Ryan, supra,* at 104; *People ex rel. Rohrlich* v. *Follette,* 20 N.Y.2d 297, 300 (1967). Since this procedure was complied with here, no state right was violated. And no federal rights were infringed upon since a defendant may voluntarily and intelligently waive his right to a jury of 12 even after deliberations have begun. *Patton* v. *United States,* 281 U.S. 276, 312 (1930); *United States* v. *Ricks,* 475 F.2d 1326 (D.C. Cir. 1973); *United States* v. *Vega,* 447 F.2d 698 (2d Cir. 1971), *cert. denied* 404 U.S. 1038 (1972); *United States* v. *Guerrero-Peralta,* 446 F.2d 876 (9th Cir. 1971); *see also* Rule 23(b), Fed. R. Crim. P.

Konigsberg cites the case of *United States* v. *Virginia Erection Corporation,* 335 F.2d 868 (4th Cir. 1964), to support his contention that the procedures followed here were constitutionally infirm. However, that case is distinguishable from this one and does not support the proposition for

which it is cited. In *Virginia Erection Corporation,* the Fourth Circuit ruled that Rule 23 of the Federal Rules of Criminal Procedure was violated and not a Constitutional right as the petitioner claims here. In addition, that case did not involve the replacement of an ailing juror with an alternate. Rather, the trial court permitted a thirteenth or alternate juror to retire with the twelve regular jurors, including an ailing juror, after the ailing juror had announced she might not be able to conclude deliberations. The ailing juror did deliberate with the eleven other regular jurors in the presence of the thirteenth juror until a verdict was reached.

The petitioner made a knowing and intelligent waiver of his right to a jury of twelve.

Konigsberg's contention that his waiver of his right to a jury of twelve was not made knowingly and intelligently is without merit. First, Konigsberg was assisted by attorney Frank Lopez when he consented to the replacement of the ill juror. He clearly was not in the position of an uncounseled defendant who required guidance from the trial court to explain his legal alternatives. Indeed, Lopez actively assisted the petitioner by examining the waiver form and in participating in the bench conference concerning the excusal of the ill juror.

Second, the petitioner's right to withhold consent to the replacement of the juror was self-evident. He could have simply refused to sign the consent form. The formality of the proceeding could only have impressed upon him that alternatives were available to him.

Third, the petitioner was not deceived or surprised into signing the waiver form. Konigsberg participated in the bench conference where the *Ryan* decision was made available by the prosecution and at which Konigsberg was personally acquainted with the governing law in adequate time to raise an objection. Moreover, Konigsberg knew in advance that he might be asked to consent to the replacement of a juror who might be unable to continue deliberations. That very contingency was cited by the court as its reason for not discharging the alternates once deliberations had begun and in explanation of its admonition to the alternates that they were not to discuss the case among themselves (4183).

Finally, it is clear that in his statement to the court immediately following the replacement, Konigsberg was not attempting to revoke his waiver. Rather, he moved for a mistrial "only because [the jury announced] they're hopelessly deadlocked" (4208). He deliberately excluded the argument now made from his motion for a mistrial. And he therefore waived any objection he might have had to the substitution.

Thus, Konigsberg voluntarily, knowingly, and intelligently consented to the replacement of the ill juror. The fact that he attempted to withdraw his consent seven hours later does not alter that fact. It demonstrates that the defendant quite understandably was upset with the guilty verdicts returned and was grasping at straws to nullify his conviction.

POINT VII

The New York Court of Appeals properly dismissed the petitioner's appeal because he deliberately refused to perfect the appeal [answering petitioner's brief, Point VI].

The petitioner contends that his right of direct appeal to the New York Court of Appeals was improperly frustrated by the state.

The petitioner was granted leave to appeal to the New York Court of Appeals the unanimous affirmance of his conviction rendered by the Appellate Division, First Judicial Department. The petitioner then made a motion to the Court of Appeals for waiver of strict compliance with certain requirements concerning the record on appeal. By order entered on September 21, 1970, the Court granted the petitioner's motion to the extent that the appeal could be prosecuted upon the original minutes of the trial and sanity hearings in lieu of the copy of the record otherwise required, and upon filing an appendix in accordance with the Rules of the Court.

Thereafter, Konigsberg made further application to proceed as a poor person and have the appendix prepared at state expense. In support of these requests he filed six affidavits in which he repeatedly asserted that his liabilities exceeded his assets but failed to supply information or financial data to support this conclusory assertion. The People filed three affidavits in opposition showing that these claims of indigency were not made in good faith. The People's affidavits include the following facts: on each prior occasion when the petitioner claimed indigency and sought state underwriting of legal expense, subsequent

events established that at the time of the request the petitioner had sufficient funds available;* petitioner and his wife own a house in Lodi, New Jersey, which in 1963 was valued at $80,000; the petitioner's mother owns property which in 1963 was valued at $288,000, which property was used in securing the petitioner's bail of $75,000 pending trail. As Magistrate SCHREIBER concluded, "The composite picture developed by these successive factual statements was such as to give a complete view of the petitioner's financial ability at the time in question" and that he was capable of bearing the cost of preparing the appendix for filing. Magistrate's Opinion p. 14.

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* In December, 1966, at the outset of petitioner's trial, when petitioner had already been in federal custody for three years, it was claimed that petitioner did not have any available financial resources, and that, therefore, the State should provide him with a daily transcript of the trial proceedings at the State's expense. When that request was denied, Konigsberg ordered, and paid for out of his own funds, a daily copy of the trial proceedings, a record that exceeded 5,100 pages at a substantial cost. During this same period he also maintained private legal representation and initiated several litigations [*See, for example, Konigsberg* v. *Clarke,* 66 Civ. 4150 (S.D.N.Y.; *Konigsberg* v. *Ciccone,* 285 F.Supp. 585 (W.D. Mo. 1968).

On August 19, 1968, petitioner, through Mr. Lopez, successfully moved in the Appellate Division, First Judicial Department, for an order dispensing with the printing of the record on the judgment appeal on the ground that the cost of printing the entire record would be "prohibitive." Between August 19, 1968, and July 17, 1970, the date of the original application in the Court of Appeals for indigent relief, Konigsberg expended more funds on private litigation. For example Konigsberg commenced four separate actions relating to a contempt information in New York County; and in some of those actions a printed brief was filed (for example, Docket No. 33939 in the United States Court of Appeals for the Second Circuit on appeal from an order of remand in 69 Civ. 2088). At the same time, Konigsberg, through privately retained counsel was litigating actions in the United States Court of Appeals for the Eighth Circuit [*Konigsberg* v. *Ciccone,* 417 F.2d 161], and the Third Circuit [*Konigsberg* v. *United States,* 418 F.2d 1270 (1969)], as well as in the U.S. Supreme Court [*Konigsberg* v. *New York,* 397 U.S. 964 (1970), (*denying cert.*); *Konigsberg* v. *Ciccone,* 397 U.S. 963 (1970), (*denying cert.*); *Konigsberg* v. *United States,* 398 U.S. 904 (1970), (*denying cert.*); *Konigsberg* v. *Mitchell, supra,* (*denying cert.*)]. Each of the briefs submitted by petitioner in the above actions was printed.

After granting a second extension of time to file the appendix, the Court of Appeals ordered that the case be dismissed if the appendix was not filed by February 1, 1971. The petitioner chose not to perfect his appeal by that date. Therefore, the appeal was dismissed.

In light of the facts presented in the People's affidavits, facts that were never controverted by the petitioner, the Court of Appeals examined the petitioner's financial situation and acted within its discretion in denying his application to proceed in forma pauperis and disimssing the appeal.

An evidentiary hearing is not required since all the facts have received thorough examination.

The petitioner demands further evidentiary hearing on the facts of his alleged indigency and inability to perfect his appeal. A federal evidentiary hearing is required when there has been no previous examination of the facts in issue nor adequate findings thereon or when new material facts have arisen since the time of such examination. *Maxwell* v. *Eyman,* 429 F.2d 502 (9th Cir. 1973). The facts herein were thoroughly reviewed by both the State appellate court and the United States Supreme Court on petition for certiorari and application for forma pauperis status therein. The petitioner does not now allege any new facts which were not considered by those courts. Nothing has occurred nor been discovered since February 1, 1971, which casts any doubt on the Court of Appeals conclusion that the petitioner was not acting in good faith when he persisted in his refusal to perfect his appeal.

Conclusion

The order appealed from should be affirmed.

Respectfully submitted,

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August, 1975

Service of 3 copies of the
within Brief is hereby
admitted this 15th day of
Aug. 1975
Signed Barbara Cassidy
Attorney for Petitioner-Appellant

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